

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

Affidavit
77-6073

To be argued by
NATHANIEL L. GERBER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6073

MOBIL OIL CORPORATION, GULF OIL CORPORATION, SHELL
OIL COMPANY and STANDARD OIL COMPANY OF
CALIFORNIA,

Plaintiffs-Appellees,

—against—

FEDERAL TRADE COMMISSION and MICHAEL PERTSCHUK,
Chairman, PAUL RAND DIXON, Member, M. ELIZABETH
HANFORD DOLE, Member, CALVIN J. COLLIER, Member,
and DAVID A. CLANTON, Member, and CAROL M.
THOMAS, Secretary, as officers of the FEDERAL TRADE
COMMISSION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

ROBERT B. FREEDMAN

*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellants.*

NATHANIEL L. GERBER,
SAMUEL J. WILSON,
*Assistant United States Attorneys,
Of Counsel.*



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APPELLANTS' REPLY BRIEF

Preliminary Statement

The Federal Trade Commission and its named members and officers (collectively the "Commission") respectfully submit this brief in reply to the brief submitted by plaintiffs-appellees.

ARGUMENT

POINT I

NEPA's EIS Requirements Do Not Apply To Adjudicatory Proceedings Of The Commission.

Plaintiffs contend in Point I of their brief that NEPA's EIS requirement applies to the *Exxon* adjudicatory proceeding because NEPA's purpose is to "promote an across-the-board adjustment in federal agency decision making so as to make the quality of the environment a concern of every federal agency." (PB 12,* quoting from *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973)). Implicit in this contention is plaintiffs' belief that imposition of the EIS requirement would be of sufficient monument to persuade the Commission to abandon *Exxon* and thus permit them to continue with the activities challenged therein.** As stated by plaintiffs:

Stripped to its essentials, the argument is that, if an adjudication will have significant environmental implications, in order to avoid the effort of analyzing those implications, the FTC may decide not to proceed with the adjudication. As the Court below determined, that is as it should be. (PB 23)

The error of this argument is demonstrated as much by the absence of specific legislative or judicial support,

* References to plaintiffs' appellate brief are designated "PB—". References to the joint appendix previously filed are designated "A—".

** Since private plaintiffs cannot sue under the Federal Trade Commission Act, the termination of *Exxon* would effectively insulate plaintiffs from the operation of that Act. See *Alfred Dunhill Limited v. Interstate Cigar Company, Inc.*, 499 F.2d 232 (2d Cir. 1974).

as by the untenable conclusion to which it inescapably leads. Plaintiffs are charged with having "maintained and reinforced a non-competitive market structure" (PB 38; A 208) in violation of the Federal Trade Commission Act, 15 U.S.C. § 45. As plaintiffs would have it, regardless of whether they have so structured the market, they should be permitted to continue their allegedly unlawful and anti-competitive conduct because of the potential environmental implications of adjudicating whether the alleged violations were committed and, if so, formulating remedial action to bring their conduct back into conformity with the statute. In other words, plaintiffs ask that NEPA be construed as restricting fundamental concepts of fair competition in those instances where the challenged anti-competitive practices are so extensive and far-reaching that their correction could have potential environmental consequences.

Such a drastic congressional intent simply cannot be inferred from general statements of NEPA's scope taken from factually unrelated contexts. Had Congress intended to so restrict enforcement of the antitrust laws, it would have stated as much in the text of the Act or at least in its legislative history. Plaintiffs have pointed to no such statement and none exist. On the contrary, as stated by the Supreme Court, repeal of the antitrust laws is not to be lightly implied, *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). Cf. *Marriot In-Flite Services v. Local 504, Air Transport Division, Transport Workers of America*, Dkt. No. 76-7466, slip op. 3733, 3742 (2d Cir., May 24, 1977). Surely repeal of those laws or any restriction upon the vigor or breadth of their enforcement must not be read by implication into a statute which was not intended to repeal by implication any other statute and which must give way where a clear and unavoidable conflict in statutory authority exists. See *Flint Ridge Development Co. v. Scenic Rivers Association*, 426 U.S. 776 (1976).

Plaintiffs contend, however, that a conflict does not exist because the EIS requirement does not impose a sufficiently severe degree of impairment upon the Commission's prosecutorial responsibilities and discretion and because the Commission does not dispute the applicability of the requirement to its rulemaking proceedings (PB 15, 21-22). Without identifying the "reasoning" of which they speak, plaintiffs contend that "if the FTC requirement of impact statements in rulemaking is related to the general applicability of rules, the same reasoning requires the preparation of an EIS in *Exxon* which, unlike most FTC adjudications, is industry wide in its scope". (PB 15).*

The argument as to the degree of conflict is simply inapplicable. The issue is not what degree of impairment of antitrust enforcement NEPA was intended to impose, but rather, and more fundamentally, whether or not NEPA applies at all. There being no basis for plaintiff's argument that NEPA was intended to impose procedural restrictions upon antitrust enforcement, the question of what degree of restriction must be found before NEPA will be held not to apply is not relevant.**

* This statement is factually erroneous since *Exxon* is not industry wide in scope. In 1975, the *Exxon* respondents controlled only 49 per cent of total domestic crude oil production. See Company Annual Reports on file with the Securities and Exchange Commission, U.S. Bureau of Mines, Department of Interior, Mineral Industry Surveys, 1975, Crude Petroleum, Petroleum Products and Natural Gas Liquids: 1975 (Final Summary), Table 5, p. 8 (February 24, 1977). In 1976, the respondents controlled only 54 per cent of domestic refining capacity. See U.S. Bureau of Mines, Department of Interior, Mineral Industry Surveys (1976), Petroleum Refineries in the United States and Puerto Rico, January 1, 1976, Table 2, pp. 4-12 (July 14, 1976).

** Plaintiffs' reliance upon *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972), is at best misplaced. The issue in that case was whether an EIS should be required in connection with federal funding of a highway which had been approved and in large measure completed prior to NEPA's effective date.

Even if degree of impairment were a relevant criterion, the delay in antitrust enforcement and other restrictions upon the Commission's prosecutorial discretion that would result from Judge Cannella's decision is sufficiently egregious to warrant reversal. NEPA itself mandates that an EIS be subjected to public review. 42 U.S.C. § 102(2)(c)(v). Given the scope and controversial nature of *Exxon*, as well as the recognized interest of its respondents, including plaintiffs herein, to delay the proceeding to the maximum extent possible, imposition of the EIS requirement would inevitably invite extensive judicial scrutiny and collateral attack before the discovery of information necessary to a proper adjudication has been completed.* Given the delay that has already been created in *Exxon*, the further delay that would result from imposition of NEPA's EIS requirement would be sufficiently impairing to satisfy even the stringent test urged by plaintiffs. Such delay would constitute an unwarranted infringement upon the Commission's well established prosecutorial discretion. As the Supreme Court has at least twice stated in the context of the Commission's execution of its antitrust responsibilities:

It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.

* The District Court has ruled that such diversions should be carried out even before the commencement of an adjudicatory proceeding.

Federal Trade Commission v. Universal-Rundle Corp., 387 U.S. 244, 251 (1967); *Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 413 (1958).

Plaintiffs' reliance upon the Commission's application of the EIS requirement to its rulemaking proceedings is equally misplaced. In marked contrast to law enforcement adjudications which are adversary proceedings, rulemaking by its very nature is designed to maximize public input and scrutiny. Thus the rulemaking provision of the Federal Trade Commission Act imposes the following public review oriented procedures.

(b) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 or Title 5 (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (2) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (3) provide an opportunity for an informal hearing in accordance with subsection (c) of this section; and (4) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B) of this section), together with a statement of basis and purpose. 15 U.S.C. § 57a(b).

That the purpose of this provision is to maximize public participation in the rulemaking is demonstrated by its legislative history:

Section 18 would permit interested persons to present their views and substantiating documentation on any proposed rule either in written form or orally. This should permit the fullest possible participation in any such rulemaking proceeding

and make available to the Commission the widest possible expression of views and data on the issues presented by proposed rules. This legislation will neither discourage written submission nor restrict the Commission in their use.

Conference Rep. No. 93-1408, 93d Cong., 2d Sess., *Reprinted in* [1974] U.S. Code Cong. & Ad. News 7764-65. As similarly stated in the House Report:

Substantial sentiment has developed over the years that in many instances the desirable manner of implementing the broad standards of Section 5(a) of the Federal Trade Commission Act should be by means of rule-making with the complaint—cease and desist order procedure used as a means of enforcing the rules. Rule-making offers the obvious advantages that (a) each person who could be affected by the proposed rule is afforded an opportunity to be heard on it in a well defined and well understood procedure, (b) the rules are developed in advance of their application to any person or practice and apply with uniformity, and (c) judicial review of any rule is available as well as of the procedures used in adopting it.

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess., *Reprinted in* [1974] U.S. Code Cong. & Ad. News 7714.

Law enforcement adjudications, such as *Exxon*, are adversary proceedings and public access is limited and within the discretion of the prosecuting agency or the confines of protective orders obtained by respondents. This distinction is emphatically made by the *Exxon* respondents including plaintiffs who have refused to provide "confidential" documents until they receive a protective order more restrictive than that ordered by the Commission. *Cf. Exxon Corp. v. FTC*, Trade Reg. Rep. (CCH) ¶ 61,464 (D. Del. Apr. 18, 1977). Moreover, whereas the purpose of rulemaking is to identify those

activities within an industry that should be prohibited prospectively. The purpose of adjudication is to ascertain and correct past or ongoing unlawful conduct by individuals charged with having violated previously enacted rules or statutes. Therefore, the discretion essential to timely and effective prosecution in an adversary context of past violations does not apply to rulemaking which is intended to regulate future trade practices.*

Plaintiffs assert that requiring an agency to issue an EIS before filing a complaint "no more interferes with an agency's prosecutorial discretion . . . than [does] . . . requiring an agency to comply with the procedures of any other statute, *e.g.*, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, or the Government In The Sunshine Act 5 U.S.C. § 552b" (PB 23). In fact, neither the APA nor the Sunshine Act in any way impinges upon prosecutorial functions of agencies. On the contrary, both statutes specifically exempt from public disclosure "investigatory records compiled for law enforcement purposes . . . to the extent that production of such records would (A) interfere with enforcement proceedings . . .," 5 U.S.C. § 552(b)(7), or matters which "specifically concern . . . the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication. . . ." 5 U.S.C. § 552b(c)(10). Thus, far from interfering with prosecutorial matters, the

* Plaintiffs assert that the EIS requirement should also apply to adjudications because rulemaking is an alternative means of enforcing the Federal Trade Commission Act (PB 15). While it is true that the Commission has broad discretion in choosing between rulemaking and adjudication as the proper method of formulating new rules of conduct, *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *Columbia Broadcasting System v. United States*, 316 U.S. 407, 421 (1942), it does not have such a choice when it comes to adjudicating whether named companies have unlawfully monopolized a market. Precisely for this reason, plaintiffs' argument that an EIS should be required in an adjudication where the agency could accomplish the same result by rulemaking does not apply here.

APA and the Sunshine Act recognize the need to insulate prosecutorial functions from public disclosure. There is consequently no support for the proposition that Congress intended to interfere with traditional prosecutorial functions by requiring proposed enforcement actions to be made public and subject to public comment and scrutiny before the action could formally begin.

Plaintiffs' assertion that other regulatory agencies have adopted the EIS requirement in connection with their law enforcement activities is in error (PB 15). The "other types of adjudications" to which the EIS requirement allegedly has been applied are not even remotely related to the Commission's adjudicatory responsibilities under the Federal Trade Commission Act. Thus in *Louisiana v. Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974), the Federal action was an order by the FPC curtailing the sale and use of natural gas as a means of dealing with the natural gas shortage. As is well known, *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), involved a licensing proceeding upon an application by New York State for authorization to construct a high voltage transmission line. See also *Arizona Public Service Commission v. Federal Power Commission*, 483 F.2d 1275 (D.C. Cir. 1973), (application for authorization to construct natural gas facilities and transport natural gas).

The regulations of the FPC and other agencies are similarly unavailing. Thus 18 C.F.R. §§ 2.80-2.82; governing the FPC's adherence to NEPA, adopt the EIS requirement with respect to license applications for 1) major projects relating to the development of navigation or development and transmission of power (18 C.F.R. § 2.81); and 2) construction of pipeline facilities and sale of natural gas (18 C.F.R. § 2.82). Similarly, the regulations of the Civil Aeronautics Board do not include adjudicatory proceedings by its Bureau of Enforcement within the range of activities falling within the

EIS requirement. See 14 C.F.R. § 312.7(i). The prosecutorial activities of the Nuclear Regulatory Commission are similarly not included in that agency's list of actions requiring preparation of an EIS. See 10 C.F.R. § 51.5. In sum, despite their vague references to case law and agency regulations, plaintiffs are unable to demonstrate any analogous or even remotely related precedent for imposing NEPA's EIS requirement upon the prosecutorial activities of regulatory agencies.

POINT II

There Has Never Been Any Proposal of Federal Action In Exxon Within The Meaning Of NEPA Or Which Could Be, As A Practical Matter, The Subject Of An EIS.

The remaining portions of plaintiffs' brief are predicated upon their assumption that the Commission has proposed relief in *Exxon* and has committed itself to restructuring the petroleum industry (PB 25, 32, 34, 38).

The fact remains, however, that the Commission stated in the *Exxon* complaint that it would take no position regarding relief until after the merits of the complaint had been adjudicated (A 215), declined to depart from that position at the time it rejected the recommendation of the administrative law judge that the complaint be withdrawn or at any other time (A 186, 231), and has stated to the Court that, consistent with the position taken upon the issuance of the complaint in 1973, the Commission does not intend to formulate any proposal for relief unless and until the *Exxon* respondents are found to have committed the violations presently charged (A 288). Moreover, the Commission has never approved, endorsed or even commented upon the 1974 statement of contemplated relief of complaint counsel, which is the only colorable basis for the inference urged by plaintiffs (A 188). Thus, plaintiffs' underlying assumption is con-

trary to the Commission's stated position that it will not formulate a proposal of relief, let alone commit itself to such a proposal, until the conclusion of the adjudication. Should plaintiffs prevail in *Exxon*, relief will never become an issue.

Plaintiffs' assumption is not only unsupported by the facts of *Exxon*, it indicates a failure to understand the function and purpose of adjudicatory complaints issued by the Commission or other regulatory agencies and is contrary to fundamental principles of due process underlying administrative adjudication. The purpose of the *Exxon* proceeding is not to effect a pre-ordained remedy but rather to determine whether the respondents have committed the violations alleged and, if such violations are found, to formulate corrective action based upon the findings and the record developed in the proceeding. While the remedy that might ultimately be proposed based upon the outcome of the proceeding might have potential environmental implications, the pendency of the proceeding and surely the issuance of the complaint do not.

Plaintiffs argue nonetheless that the distinction between the Commission and complaint counsel is "artificial" (PB 37) and that the Commission has itself proposed divestiture or the restructuring of the petroleum industry simply because of its acquiescence in the continuation of the proceeding. As stated in their brief:

The Court below did not infer the existence of an agency proposal for action in this case; it is documented in the record. The Commission is not engaged in idle speculation over oil industry divestiture. The Commission (not its staff) moved beyond "contemplation" by inaugurating an investigation of the petroleum industry, by issuing the *Exxon* complaint based on the information collected in its investigation and by continuing to support this major federal action with funding in the millions of dollars. (PB 34).

The inevitable implication of this argument is that the institution of an adjudicatory proceeding and the expenditure of administrative or judicial resources in the furtherance of that proceeding undermine the impartiality of the decision-maker and foretell an outcome and remedy adverse to the interest of the respondent. This theory is without any support in and contrary to the record in *Exxon* and contradicts well established principles of administrative due process.

A similar claim was rejected by the Supreme Court in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948), where the respondents in an adjudicatory proceeding also charging anticompetitive practices demanded that Commission members disqualify themselves because the Commission had participated in the underlying investigation and its members had testified before Congress concerning the legality of the disputed practices. The claim was confuted by the assumption that the Commission had already formed an opinion as a result of its prior official investigations. *Id.* at 700. The Court rejected the claim, stating:

[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. *Id.* at 701.

In specific response to a due process argument, the Court asserted:

[No] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. *Id.* at 702-703 (footnote omitted).

See also *Withrow v. Larkin*, 421 U.S. 35 (1975); *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974); *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962).

Thus, plaintiffs' assumption that the Commission was proposed or predetermined the remedy is contrary to the record and to the principles set forth in *Cement Institute*.*

Because there has been no proposal of federal action in the NEPA sense, one need not even address the argument that unless an EIS is prepared at this stage of *Exxon*, an irreversible or irretrievable commitment of resources will occur precluding meaningful compliance at a later date. Nonetheless, plaintiffs have failed to respond to the Commission's argument that whereas NEPA defines the irreversible resources which must precede rather than follow an EIS as those "which would be involved in the

* The assumption is all the more remarkable given that the Commissioners serve seven years terms (subject to reappointment), 15 U.S.C. § 41, and that discovery and initial adjudication by the administrative law judge will not be completed until long after the terms of each of the present Commissioners has expired.

proposed federal action should it be implemented," 42 U.S.C. § 4332(2)(C)(v), the only commitment of resources in *Exxon* is the expenditure of time and money to prosecute and adjudicate the merits of the complaint. Such resources have no relationship to the depletion of natural resources which plaintiffs fear may ultimately result.

Rather than confront this distinction, plaintiffs characteristically rely upon dicta from cases having no factual similarity to *Exxon*. Thus, plaintiffs point to this Court's decision in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 539 F.2d 824 (2d Cir. 1976), cert. granted, 45 U.S.L.W. 3651 (Mar. 29, 1977) for the proposition that (PB 28):

[W]here broad action has been proposed which would have obvious environmental consequences and where irretrievable commitments to that action are being made which would effectively preclude options, the absence of specificity in the proposed action does not excuse compliance with NEPA.

The facts of that case, however, are so clearly different from *Exxon* that plaintiffs' reliance thereon is not comprehensible. An EIS was required regarding the interim licensing of the use of mixed oxide fuel and related activities for the stated reason that:

the interim activity is clearly tied to the anticipated wide-scale use and would commit substantial resources to the mixed oxide fuel technology. *Here the activity which will be permitted involves construction of nuclear separation and reprocessing facilities, conversion of light water nuclear reactors to use of mixed oxide fuel, and the implementation of "interim" safeguards for the transportation of a deadly and highly radiotoxic nuclear material. Each of these steps will tip the scale towards a favorable final decision on wide-scale use. Each of these steps will move the nation towards the*

use of a hazardous nuclear fuel the implications of which are not fully understood. *Natural Resources Defense Council v. United States Nuclear Regulatory Commission*, *supra*, 539 F.2d at 844. [Emphasis added.]

Here, however, the interim activity cannot be construed as committing resources toward the depletion of natural resources or tipping the scale in that direction, for the only direction taken by the Commission in *Exxon* is toward the adjudication of the merits of the complaint.

Plaintiffs' efforts to distinguish *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), and *Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures* ("SCRAP II"), 422 U.S. 289 (1975), are equally unavailing. Plaintiffs assert that *Kleppe* marks out three stages of action by an agency—contemplated, proposed and ordered—and that because there would never be a proposal of relief by the Commission, only a final order, an EIS must be prepared while the proposal is still in the contemplation stage (PB 34-35). In fact, however, no such tripartite distinction is made in *Kleppe*. More important, even if the distinction were made, it would have no bearing upon the import of *Kleppe* that NEPA does not require the preparation of an EIS until there has been a *proposal of action by the agency*, 427 U.S. at 406 n.15, and, from a practical standpoint, until there exists the necessary "factual predicate for the production of an environmental impact statement of the type envisioned by NEPA." 427 U.S. at 402. Given that the disputed federal action hypothesized by plaintiffs—depletion of our natural resources—is speculative and, at best, in the contemplation stage, the EIS requirement has not been triggered and plaintiffs' concern is premature.

The alleged absence of a proposal stage in the Commission's adjudicatory process is not inconsistent with *Kleppe* or its application to *Exxon*. If NEPA is ap-

plicable, its mandate could be satisfied by prohibiting the carrying out of any relief formulated by the Commission until such time as an EIS were prepared based upon that formulation. Because there would be no cognizable commitment of resources until that time, and because the adjudication would be facially neutral in its environmental impact, NEPA's purpose would be adequately accomplished.

This was the conclusion reached by the Supreme Court in *SCRAP II*, *supra*, 422 U.S. 289, where the Court was presented with a request for an EIS in connection with proposed surcharges and general rate increases approved by the Interstate Commerce Commission ("ICC"). The Court held that a statement was not required until ICC approval of the railroads' proposals had actually been issued: "[T]he time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a proposal for federal action." *Id.* at 320. *Cf. Kleppe v. Sierra Club*, *supra*, 427 U.S. at 402. The Court further held that an EIS need not be prepared in connection with any interim increases which were "entirely nonfinal" and facially neutral in their environmental impact for the stated reason that a later consideration of environmental factors by the ICC before issuing its final order of approval would adequately accomplish NEPA's purpose. 422 U.S. at 322. *See also City of Willcox v. Federal Power Commission*, Dkt. No. 74-2123, slip op. 40-47 (D.C. Cir., June 30, 1977). *Cf. Natural Resources Defense Council v. Nuclear Regulatory Commission*, *supra*, 539 F.2d at 844.

Finally plaintiffs contend that the Commission has sufficient information with which to prepare an EIS and that its preparation at this stage would not exceed the reasonable forecasting and speculation implicit in the EIS requirement (PB 29-31, 36). We do not dispute that a *reasonable* degree of forecasting would not necessarily

preclude the preparation of a meaningful EIS. But that it is a far cry from the degree of speculation and conjecture that would inevitably underlie an EIS prepared at this stage of *Exxon*.

The environmental consequences of any relief cannot be fruitfully analysed until the nature of the relief becomes known. The Commission will not have occasion to formulate any relief until the conclusion of the adjudication (A. 228). More important, the nature of the relief cannot be known until the conclusion of the adjudication since any relief that may be formulated would be a function of the nature of the activities found to be unlawful and in need of remedy. Although plaintiffs apparently anticipate that an EIS would limit the scope of complaint counsel's investigation of their activities and the Commission's adjudication of their lawfulness (PB 45), the proper function of an EIS would be only to ascertain the environmental implications of any relief that might be proposed by the Commission, should plaintiffs' activities be found unlawful.

Thus, until the conclusion of the adjudication the Commission is at least twice removed from the factual predicate that would have to underlie any meaningful EIS prepared in *Exxon*. As one Court put it in a post *Kleppe* decision,

Any other procedure would generate what has been called in other contexts "a quagmire of hypothetical judgments." The 'triggers' for environmental impact statements must be kept sufficiently well defined to avoid wasteful and possibly destructive misfires of NEPA's shotgun. See *Kleppe v. Sierra Club*, [427] U.S. [390], 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976).

Colorado Public Interest Research Group, Inc. v. Hills, 420 F. Supp. 582, 586 (D. Colo. 1976).

POINT III**Plaintiffs Do Not Have Standing To Maintain This Action.**

To make the requisite showing of standing, plaintiffs must demonstrate both that the challenged action has caused them injury in fact and that such injury is within the zone of interests to be protected by NEPA. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972). Plaintiffs have failed to refute the Commission's argument that they do not satisfy either requirement.

As to the first requirement,

[a]bstract injury is not enough. It must be alleged that the plaintiff "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged statute or official conduct. . . . The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

O'Shea v. Littleton, 414 U.S. 488, 494 (1974). As explained above, *Exxon* cannot possibly have any environmental consequences until the conclusion of the adjudication and the formulation of a final order of relief by the Commission. That time will not be reached for at least five and probably many more years. Until such time, the nature of any *injury* that might befall plaintiffs cannot be ascertained because the remedy is unknown and is dependent upon the outcome of the adjudication. Thus, plaintiffs' allegations of injury in fact are at best conjectural, remote and hypothetical. Plaintiffs have failed to dispute this characterization of their injury and rest instead upon the dubious proposition that "[t]he alleged 'remoteness' of plaintiffs' injury does not defeat their standing." (PB 46).

Plaintiffs have also failed to satisfy the second criterion, for the interest which they seek to protect is not within NEPA's intended scope. Indeed, plaintiffs have misconstrued the Commission's argument as to this issue. Plaintiffs repeatedly state that they are not deprived of standing by virtue of their commercial status. The Commission did not raise this argument in its brief on appeal. However, given plaintiffs apparent lingering concern, it should be noted that at least two Circuits have held that corporate plaintiffs, which exist solely as profit seeking entities, cannot assert a cognizable injury within the meaning of NEPA. *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 507 F.2d 905, 908-910 (9th Cir. 1974); *Clinton Community Hospital Corp. v. Southern Maryland Medical Center*, 374 F. Supp. 450 (D. Md. 1974), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975).

Moreover, plaintiffs ignore the holding of the District of Columbia Circuit in *Gifford-Hill & Co., Inc., v. Federal Trade Commission*, 523 F.2d 730, 731-732 (D.C. Cir. 1975) (*per curiam*), *aff'd* 389 F. Supp. 167 (D.D.C. 1974), that NEPA's zone of interests does not extend to the desire of parties to prevent or delay administrative efforts to enforce the antitrust laws. In *Gifford-Hill*, analogous efforts were made by a respondent in a Commission adjudicatory proceeding with similar unsupported claims of environmental injury that would result from the adjudication. The Court of Appeals affirmed the decision of the District Court rejecting the claim and held that the alleged injury

does not affect an interest even arguably "within the zone of interests to be protected or regulated" by NEPA. NEPA's concern is with protection of the environment, not with the desire of parties to prevent or delay administrative efforts to enforce the antitrust laws. 523 F.2d at 731-732 [Footnote omitted.]

To the extent that plaintiffs seek judicial intervention at this stage of *Exxon*, even though it is clear that the remedial actions which might arguably inflict injury will not be formulated for years, they are similarly attempting to prevent or delay the Commission's efforts to enforce the antitrust laws. As in *Gifford-Hill*, such unintended use of NEPA should not be sanctioned and plaintiffs should be denied standing.

CONCLUSION

The decision of the District Court should be reversed.

Dated: New York, New York
August 8, 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Defendants-Appellants.*

NATHANIEL L. GERBER,
SAMUEL J. WILSON,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Nathaniel L. Gerber being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
he served ~~a copy~~ of the
8th day of August 19 77
within Appellant's Reply Brief

by placing the same in a properly postpaid franked envelope addressed:

Donovan, Leisure, Newton and Irvine
30 Rockefeller Plaza
New York, New York 10020

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

8th day of August, 19 77

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